

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MARTIN CROWLEY,

Plaintiff,

v.

STATE OF NEVADA, BY AND THROUGH  
THE SECRETARY OF STATE; et al.,

Defendants.

3:08-cv-0618-LRH-VPC

ORDER

Before the court are defendants motions for summary judgment (Doc. ##30, 33<sup>1</sup>) and plaintiff Martin Crowley's ("Crowley") cross-motion for summary judgment (Doc. #31).

**I. Facts and Background**

In 2006, Crowley was a candidate for judicial office in Churchill County, Nevada. Crowley lost the election by 26 votes and requested a recount. The recount was held on November 21, 2006. Crowley was present at the recount and alleges that there were multiple violations of the Help America Vote Act ("HAVA"). In particular, Crowley alleges that the Voter Verified Paper Audit Trail ("VVPAT"), which is printed from the voting machines, was not used as the paper audit during the recount as required by HAVA.

On November 21, 2008, Crowley filed suit against the Clerk of Churchill County, Nevada

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<sup>1</sup> Refers to the court's docket number.

1 (“Churchill County”) and the State of Nevada by and through Dean Heller, the Nevada Secretary  
2 of State (“Secretary Heller”), alleging six causes of action: (1) declaratory judgment that the  
3 recount violated HAVA; (2) Section 1983 claim for violations of federal voting rights; (3) Section  
4 1983 claim for violation of Due Process; (4) declaratory judgment that an independent overseer be  
5 appointed for any future election; (5) First Amendment violation; and (6) declaratory judgment that  
6 the Secretary of State for the State of Nevada did not comply with the HAVA certification  
7 procedures in 2006. Doc. #1.

8 On April 9, 2009, defendants filed a motion to dismiss. Doc. #9. On February 3, 2010, the  
9 court granted in-part and denied in-part defendants’ motion and dismissed claims one, four, and six  
10 for declaratory relief. Doc. #25. Thereafter, the parties filed the present motions for summary  
11 judgment on the remaining causes of action: claim 2 for a violation of HAVA; claim 3 for a Due  
12 Process violation; and claim 5 for a First Amendment violation. *See* Doc. ##30, 31, 33.

## 13 **II. Legal Standard**

### 14 **A. Summary Judgment**

15 Summary judgment is appropriate only when “the pleadings, depositions, answers to  
16 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
17 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter  
18 of law.” Fed. R. Civ. P. 56(c). In assessing a motion for summary judgment, the evidence,  
19 together with all inferences that can reasonably be drawn therefrom, must be read in the light most  
20 favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475  
21 U.S. 574, 587 (1986); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir.  
22 2001).

23 The moving party bears the burden of informing the court of the basis for its motion, along  
24 with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*,  
25 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party  
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1 must make a showing that is “sufficient for the court to hold that no reasonable trier of fact could  
2 find other than for the moving party.” *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.  
3 1986); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1141 (C.D. Cal. 2001).

4 To successfully rebut a motion for summary judgment, the non-moving party must point to  
5 facts supported by the record which demonstrate a genuine issue of material fact. *Reese v.*  
6 *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material fact” is a fact “that might  
7 affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
8 242, 248 (1986). Where reasonable minds could differ on the material facts at issue, summary  
9 judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute  
10 regarding a material fact is considered genuine “if the evidence is such that a reasonable jury could  
11 return a verdict for the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere existence of  
12 a scintilla of evidence in support of the plaintiff’s position will be insufficient to establish a  
13 genuine dispute; there must be evidence on which the jury could reasonably find for the plaintiff.  
14 *See id.* at 252.

15 Where, as here, parties filed cross-motions for summary judgment on the same claims  
16 before the court, the court must consider each party’s motion separately and on its own merits. *Fair*  
17 *Hous. Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001)  
18 (citations omitted). Accordingly, “the court must consider the appropriate evidentiary material  
19 identified and submitted in support of both motions, and opposition to both motions, before ruling  
20 on each of them.” *Id.* at 1134.

21 **B. 42 U.S.C. § 1983**

22 To prevail on a claim brought under to 42 U.S.C. § 1983, a plaintiff must allege that the  
23 defendant: (1) while acting under color of any statute, ordinance, regulation, custom or usage of  
24 any State or territory; (2) subjects, or causes to be subjected, any person within the jurisdiction of  
25 the United States to the deprivation of any rights, privileges, or immunities secured by the  
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1 Constitution and laws of the United States. *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir.  
2 2006).

### 3 **III. Discussion**

#### 4 **A. Help America Vote Act**

5 The Help American Vote Act provides in pertinent part that any state voting system “shall  
6 produce a permanent paper record, each individual paper record of which shall be made available  
7 for inspection and verification by the voter at the time the vote is cast, and preserved within the  
8 polling place . . . for later use in any manual audit.” HAVA § 301(a)(2)(B). Further, Nevada law  
9 requires that, after an election, “if a recount is demanded pursuant to the provisions of NRS  
10 293.403 . . . the county or city clerk shall ensure that each mechanical recording device which  
11 directly recorded votes electronically . . . provides a record printed on paper of each ballot voted on  
12 that device.” NRS 293B.400.

13 Crowley argues that he is entitled to summary judgment on his HAVA claim because it is  
14 uncontested that defendants did not use the VVPAT as the auditable paper record in his requested  
15 recount in violation of HAVA. However, the court finds that these statutes do not require the use of  
16 the VVPAT during a recount. There is no language in either HAVA § 301 or NRS 293B.400 that  
17 mandates the use of the VVPAT in a recount. In referencing the VVPAT, HAVA only requires that  
18 it be available for each voter’s inspection if requested. *See* HAVA § 301(a)(2)(B). Further, the  
19 Nevada statutes make no reference to the VVPAT and only require that a permanent paper record  
20 be used in a recount. *See* NRS 293B.400. Therefore, the court finds that defendants are entitled to  
21 summary judgment that they did not violate HAVA or NRS 293B by using a manual paper audit  
22 different from the VVPAT during Crowley’s requested recount.

#### 23 **B. Substantive Due Process**

24 The Due Process Clause of the Fourteenth Amendment provides that no State shall “deprive  
25 any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV. In  
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1 his complaint, Crowley alleges that defendants, acting under color of state law, deprived him of his  
2 substantive Due Process rights because Churchill County allegedly destroyed absentee ballots sent  
3 in for the election during the recount without allowing any opportunity for Crowley to review or  
4 challenge those ballots. Such destruction, he claims, is a violation of his Due Process rights.

5 The court finds that Crowley's allegations of a substantive Due Process violation are  
6 without evidentiary support. There is no evidence before the court that any absentee ballots were  
7 destroyed during the recount process or that any votes were not counted. Crowley has failed to  
8 provide any evidence indicating that defendants destroyed absentee ballots or did not follow proper  
9 recount procedures. Accordingly, the court shall grant defendants' motions for summary judgment  
10 as to this cause of action.

### 11 **C. First Amendment**

12 The First Amendment provides that "Congress shall make no law respecting an  
13 establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of  
14 speech, or of the press; or the right of the people peaceably to assemble, and to petition the  
15 Government for a redress of grievances." U.S. Const. Amend. I. Freedom of association  
16 encompasses the right to vote. *See Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

17 Crowley alleges that defendants deprived him of his First Amendment right to vote because  
18 they could not ensure, through their improper recount procedures, that his vote was actually  
19 counted. Specifically, Crowley claims that his rights were violated because (1) the ballots were  
20 printed without public oversight, and (2) neither Crowley, nor Crowley's recount witnesses, were  
21 permitted to join in the recount or oversee the recount observation group.

22 The court finds that Crowley has failed to establish a cognizable First Amendment claim  
23 because there is no evidence that Crowley's vote was not counted in the election. The evidence  
24 before the court established that defendants complied with HAVA and the Nevada election statutes  
25 in Crowley's requested recount and therefore, defendants acted properly in carrying out Crowley's  
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1 requested recount. There is no evidence before the court that Crowley's vote was not counted or  
2 that his First Amendment right to vote was violated.

3 Further, Crowley has failed to establish any link between the preclusion of his recount  
4 witnesses or the creation of the election ballots and his First Amendment claim that his vote was  
5 not counted in the election. Accordingly, the court shall grant defendants' motions for summary  
6 judgment.

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8 IT IS THEREFORE ORDERED that defendants' motions for summary judgment  
9 (Doc. ##30, 33) are GRANTED.

10 IT IS FURTHER ORDERED that plaintiff's motion for summary judgment (Doc. #31) is  
11 DENIED.

12 IT IS FURTHER ORDERED that the clerk of court shall enter judgment accordingly.

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14 IT IS SO ORDERED.

15 DATED this 19th day of November, 2010.



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18 LARRY R. HICKS  
19 UNITED STATES DISTRICT JUDGE  
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